ORIGINAL

NO. 87-1571

OCTOBER TERM, 1987

IDENTIFICATION OF CORPORATIONS

PURSUANT TO THE PROVISIONS of Rule 28.1 of the Supreme Court Rules, respondents state that their defense costs are being paid by The City of Charlotte, a municipal corporation located in Mecklenburg County, North Carolina, pursuant to a city resolution enacted prior to the date of the incident of which plaintiff complains, which resolution provides for defense and indemnification of police officers for claims made against them for actions performed in the line of duty. There are no known private corporations or insurance companies with any interest in the outcome of this claim and The City of Charlotte has not invoked any reservation of rights.

QUESTION PRESENTED

WAS THERE ANY EVIDENCE OF USE OF UNREASONABLE FORCE SUFFICIENT TO BE SUBMITTED TO A JURY ON ANY CLAIM OF VIOLATION OF CONSTITUTIONAL RIGHTS?

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NO. 87-6571

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

****

DETHORNE GRAHAM,

Petitioner

vs

M.S. CONNOR, R.B. TOWNES,
T. RICE, HILDA T. MATOS,
and M.M. CHANDLER,

Respondents

****

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

****

Respondents respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for Fourth Circuit be denied.

OPINIONS BELOW

Respondents accept this paragraph from the Petition and further say that references herein to the Appendix will be to the Appendix attached to the Petition, e.g. (Petition App at p.)

JURISDICTION

Respondents accept this paragraph from the Petition.

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

There is no reference to the Fourth Amendment in the Complaint or the Trial Court's Order allowing a directed verdict.

STATEMENT OF THE CASE

A. INTRODUCTION

Plaintiff did not refer to or pray for relief under the Fourth Amendment in his Complaint. He alleged in a conclusory manner that his rights under the Fourteenth Amendment were violated.

B. FACTS

What the facts were not:

There was no evidence whatever of any of the following:

That any defendant hit plaintiff.

That any defendant struck plaintiff.

That any defendant kicked plaintiff.

That any defendant closed a car door on plaintiff.

That any defendant struck any part of plaintiff with any part of any car while he was being put into it.

That any defendant did anything whatever to cause plaintiff to sustain a broken foot or how it was broken.

That any defendant arrested plaintiff.

That any defendant charged plaintiff.

That any defendant acted in any manner upon hearing one unidentified female officer's remark that plaintiff was drunk and should be locked up.

That any defendant put any handcuffs on plaintiff "too tight."

That any medical condition demonstrated by plaintiff was in any manner aggravated by any act of any defendant or by anything at all.

That any claimed medical condition was a result of any act by any defendant. (Plaintiff did testify that he had ringing in his ear later after the incident but admitted on cross examination that his doctor said it could come from his use of guns.)

That "four officers threw him into a police car." (Petition App 8a)

What the facts were:

On plaintiff's claim that the handcuffs were too tight, he testified he lost consciousness and that either the handcuffs were on or were being put on when he regained consciousness and they were "real tight." (T 5, 6, 7) They remained on until he was taken home. (T 9, 10) After he was given orange juice at home, they were removed and the officers left. (T 10, 11) Plaintiff did not testify that any defendant put them on or caused them to be tight. There was no evidence whatever that they were initially put on tight enough to cause him any injury or that he ever complained about how tight they were or that any defendant had any reason to know they were tight. The only evidence they were "tight" was plaintiff's statement they were "tight." The only evidence connecting any defendant to putting on the handcuffs was that the defendants were present while they were on, that Rice at one time had a grip on plaintiff's arm, and Townes's testimony that plaintiff "was handcuffed" because he was fighting and kicking. (T 72, 73) Sending this case to the jury on an issue of whether handcuffs were unconstitutionally tight would mean that officers who were present when handcuffs were put on are responsible in damages for the tightness of handcuffs when there is no evidence that a defendant put them on at all or that there was any way for them to know how tight they were when plaintiff made no complaint about it at anytime.

Further, there was substantial evidence plaintiff flailed about after being handcuffed and could have caused any bruising himself. Finally, as to handcuffs, plaintiff's own expert witness Dr. Robert Meadows testified, "I have no problem with him being subdued and handcuffed." (T 107)

On plaintiff's claim that his head was "slammed" onto the automobile causing injury, plaintiff testified he refused to sit still in the car for an investigation (T 4), that he blanked out and the next thing he could recall he was lying on the ground (T 4), that officers got him to his feet with handcuffs on (T 5), that he had lost his "senses" but was coming to (T 6), that as he stood over the car, "I was bending over trying to get my wallet out because my hands was cuffed." (T 7) While trying to get to his pocket, "somebody" told him to shut up to which he replied, "Don't tell me to shut up because I'm trying to tell you what's wrong with me," (T 7) that "somebody grabbed me from behind and slammed my head into the hood of Mr. Berry's car...." (T 7) He did not "realize any ringing in my ears right then" (T 12) although he did later (T 12), that he saw Dr. Goldberg about the ringing (T 14) and Dr. Goldberg told him that shooting his guns "could have something to do with it." (T 33) He owns and shoots "five, maybe six" guns (T 32) and holds his right ear near them in firing (T 33). The

"somebody" who told him to shut up and the "somebody" who pushed him were never identified as any defendant. Witness Berry testified he saw "Mr. Wright" (there is no such defendant) stand plaintiff over the hood (T 83), and saw plaintiff's head get pushed down toward the hood by "a blond lady" (T 83, 84). He testified in response to a question by plaintiff's attorney whether he saw or heard an "impact," "Well, as far as the impact, I didn't hear no impact, but I did see her push his head down." (T 84) The "blond lady" was never identified as a defendant (The Trial Court's finding that it was Matos was not supported by any evidence and was challenged by counsel during argument on the motion for directed verdict.) (Petition App 22) (T 120) Defendants Matos and Chandler are both blond ladies, but neither was identified as having pushed plaintiff by any witness although both were at trial. Plaintiff did identify Matos as having refused later to let him have orange juice (T 8), but he also identified Chandler as the one who refused him the juice. (T 17) Not one witness ever said Matos or any other defendant pushed plaintiff's head down.

On plaintiff's claim that excessive force was used to put him in the police car, there is just no evidence of it at all and there is absolutely no evidence that being placed in the car caused him any injury whatever. Judge Butzner,

in his dissenting opinion, wrote that "four officers threw him into a police car," (Petition App 8a) but no witness testified to that. It just is not in the record. There was evidence that four officers carried plaintiff to the car, but as to how he got in, the evidence is that plaintiff testified that "one of them opened the door and threw me in like a bag of potatoes and closed the door." (T 7) That this was obviously no more than slang is shown by all the other testimony. Plaintiff also testified, "[T]hey put me in the car." (T 31) Officer Townes testified plaintiff was fighting and kicking and that he unlocked the back door and that Chandler, a female, "pulled him in." (T 73) Plaintiff's friend Berry testified that four officers "toted him to the car, the back of the police car, and put him in head first, and then the officer that stopped us, he took him and went around the car and opened the other side of the door and pulled Mr. Graham through while the other three fed him in." (T 81) Not one witness said or suggested that being put into the car caused any hard contact or any injury. Slang about a bag of potatoes should not be enough to go to a jury.

On plaintiff's claim that he was unconstitutionally deprived of orange juice, there is simply no evidence that any such conduct was sound or unsound or that any delay

caused any conceiveable injury or even a problem for plaintiff. The evidence is only that a female officer used coarse language in refusing to give it to plaintiff when he wanted it. There is no evidence this officer had ever even heard of plaintiff's diabetes or knew anything except he had been subdued and put into a car. The evidence is that plaintiff was promptly given the juice upon arriving at home away from the crowd and there is absolutely no evidence of any unpleasant effects either from having it or not having it.

C. DIRECTED VERDICT

The terms of the Order allowing motions for directed verdict speak for themselves. (Petition App 9a-15a)

D. OPINION BELOW

The terms of the opinion of the Court of Appeals speak for themselves. (Petition App 1a-8a)

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT WITH TENNESSEE V. GARNER.

Plaintiff's difficulty is still the same here as it was in the trial court and in the Court of Appeals, which is that notwithstanding his repeated assertions that he has some evidence, he has none. Judge Potter didn't have to

weigh evidence or decide whether it was true, there wasn't any to weigh. Plaintiff is trying to compare a case with no evidence with cases in which there was evidence.

The closest he can get is in the testimony about contact made by his head on the hood of the car. His first problem is that there is no evidence who pushed him and no evidence of a conspiracy to push him or use force on him, so there is no one upon whom he can focus this claim. If he survives this problem, his next problem is that plaintiff's own description of it is the only testimony to the effect that anything happened other than that his head was pushed downward, which is all that Berry said he saw.

So, plaintiff is reduced to an argument that his own testimony that some unidentified person "slammed my head into the hood" is enough. His problem is that this is nothing more than conclusory slang, and the record shows that plaintiff and Berry continuously employed slang expressions rather than statements of fact.

For example, plaintiff testified that he saw police officers "all over me," (T 5) they "snatched me up," (T 6) one officer (not four) "threw me in like a bag of potatoes," (T 7) his relationship with his girlfriend was that they "had been talking about three years." (T 35) None of this is evidence of getting hit, struck, kicked, or injured.

His friend Berry testified that when two officers were

sent later to investigate, they "jumped out of the car" (T 82) even though the event had long passed, that prior to that at the scene the unidentified female who pushed plaintiff's head down had "jumped on his head" while plaintiff was <u>standing</u> by the car (T 84). Pushed to its logical extreme, this testimony alone could be argued to support an issue of whether the officer actually jumped physically onto the head of a standing adult male. It seems obvious that Judge Potter did not consider this expression to be anything more than slang rather than evidence that an officer jumped onto the standing plaintiff's head, and Judge Potter is the one who had to decide whether there was any evidence. Even so, Berry was very clear that when plaintiff's head got pushed down, he detected "no impact." (T 84)

Judge Potter, who heard the evidence and saw the witnesses, found in his Order that the evidence was that "One of the officers, Matos [an identification not supported even by slang, much less evidence], <u>shoved his head down</u> and told him to shut up that no one had asked him anything." (Petition App 11a) (emphasis added) Judge Potter did not find there was any evidence of "impact" on the hood of the car.

As to getting thrown into the car, Judge Potter found that "<u>The evidence was</u> that two officers were pushing from

behind and one entered the vehicle from the other side and pulled on the Plaintiff until he was in the car." (Petition App 12a) (emphasis added)

Judge Potter also found "absolutely no evidence that the Defendant police inflicted any injury on the Plaintiff." (Petition App 13a) (emphasis added)

Rather than having "applied factors giving rise to a cause of action under §1983 based upon King v. Blankenship, 481 F.2d 270 (4th Cir. 1980) and Johnson v. Glick, 481 F.2d 1083 (2nd Cir. 1973) . . . ," as asserted by plaintiff (Petition 7), it would be more accurate to say that Judge Potter found no evidence of anything to apply and that the Court of Appeals agreed with him.

Whether plaintiff is required to show evidence that he was injured by grossly negligent or reckless conduct, or that some defendant acted with malice, sadism or wantonness, or what is reasonable considering the totality of the circumstances (Tennessee v. Garner), the first burden is the same, to present some evidence that some identifiable defendant did something which is not permitted. This plaintiff has not met that opening burden.

This is not Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985) in which there was evidence that officers beat, kicked, and maced Kidd while he was handcuffed and inflicted a head gash requiring stitches, where officers admitted

hitting him with a stick and macing him but contended it was needed. Cases with no evidence will not compare to cases with evidence.

The Court of Appeals found that Judge Potter was right, that "appellant's evidence could not support a verdict in his favor." (Petition App 5a) Although plaintiff had a broken foot, the Court of Appeals found, "Nevertheless, there was no testimony from which a reasonable juror could infer that any officer struck Graham or in any way inflicted that injury." (Petition App 5a) (emphasis added) The Court found there was "no medical evidence to support his allegation of head injury." (Petition App 5a) (emphasis added) The Court of Appeals found "there is no evidence that the officers denied appellant medical treatment." (Petition App 5a) (emphasis added)

This case is not the one to be used to clear up the law in cases where there is evidence.

II. REGARDLESS OF THE CASES FROM THE FIRST, SECOND, SEVENTH, AND NINTH CIRCUITS, THERE IS STILL NO EVIDENCE IN OUR CASE, SO THAT THIS CASE IS NOT APPROPRIATE FOR THE PURPOSE OF UNIFYING THE COURTS.

Regardless of how the Court of Appeals worded our

opinion, it comes out the same, they found no evidence that should have been submitted to a jury. Assuming for the purposes of argument that a jury might have been given instructions we cannot foretell in a case where there was evidence, there is still no evidence.

No matter what other courts say, in this case the record is searched in vain for answers to questions such as these:

> If a defendant struck plaintiff, who did it?
> If a defendant injured plaintiff's foot, who did it?
> If a defendant caused plaintiff a head injury, who did it?
> If a defendant injured plaintiff while putting him into a car, how did it happen?
> If a defendant injured plaintiff while putting him into a car, who did it?
> If a defendant other than Connor knew of plaintiff's illness, who was it?
> If a defendant aggravated plaintiff's illness, how was it done?
> If a defendant aggravated plaintiff's illness, who did it?
> If plaintiff suffered any injury because he has an illness, what injury was it?

III. THIS CASE IS NOT THE "CONVENIENT VEHICLE" CONTENDED BY PLAINTIFF IN HIS CONCLUSION.

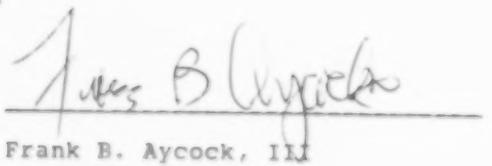
Important federal questions should be settled by cases in which there is evidence upon which jurors can find for plaintiff. How can proper jury instructions be framed where there is nothing to send to the jury?

Respondents are not aware of any conflict between this opinion from the Fourth Circuit and any opinion which permits a directed verdict when there is no evidence.

CONCLUSION

Respondents pray that the Petition be denied.

RESPECTFULLY SUBMITTED.



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CERTIFICATE OF SERVICE

I certify service of the foregoing BRIEF IN OPPOSITION upon plaintiff by depositing a copy of same in a United States mailbox with first class postage prepaid, one each addressed to the following:

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This 29 day of June, 1988.

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